No. 89-661

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

TWENTIETH CENTURY FOX FILM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the court of appeals correctly upheld the district court's finding of criminal contempt against petitioner for willfully disobeying an antitrust consent decree.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 882 F.2d 656. The pertinent opinions of the district court (Pet. App. 24a-35a, 36a-44a) are reported at 700 F. Supp. 1242 and 700 F. Supp. 1246.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1989. Pet. App. 22a-23a. By an order dated October 2, 1989, Justice Marshall extended the time for filing a petition for a writ of certiorari to October 24, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of criminal contempt, in violation of 18 U.S.C. 401(3). Petitioner was sentenced to pay a $500,000 fine and an additional $40,397 in costs. The court of appeals affirmed the district court's finding of criminal contempt but vacated the sentence and remanded for further proceedings. Pet. App. 1a-21a.[1]

1. In 1938, the United States filed an antitrust action in the United States District Court for the Southern District of New York against petitioner Twentieth Century Fox Film Corporation and several other major film distributors. The original complaint alleged that petitioner and other film distributors had engaged in a variety of practices that violated Section 1 of the Sherman Act, 15 U.S.C. 1. Those practices included "block-booking," namely, "conditioning the licensing of one film or group of films upon the licensing of one or more additional films." Pet. App. 3a. After protracted litigation, the district court determined that petitioner's block-booking violated the Sherman Act. *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 348 (S.D.N.Y.), judgment entered, 70 F. Supp. 53, 72 (S.D.N.Y. 1946), aff'd in part and rev'd in part, 334 U.S. 131 (1948), on remand, 85 F. Supp. 881 (S.D.N.Y. 1949), aff'd, 339 U.S. 974 (1950). In 1951, petitioner consented to the entry of a decree, Section II(7) of which enjoins petitioner from

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[1] The court of appeals held that petitioner had been deprived of its constitutional right to a trial by jury because the government sought penalties exceeding $100,000. Pet. App. 15a. The government has not sought further review of that aspect of the court of appeals' judgment.

The government recently has told petitioner that, on remand, it will not seek a fine greater than $100,000, and thus the case will not need to be retried under the court of appeals' mandate.

engaging in block-booking. See *United States* v. *Loew's, Inc.*, [1950-1951] Trade Cas. (CCH) ¶ 62,861, at 64,545-64,546 (S.D.N.Y. 1951). Pet. App. 3a-4a.[2]

In October 1988, petitioner and Leila J. Goldstein, the manager of petitioner's Minneapolis/Indianapolis/Milwaukee branch office, were indicted in the Southern District of New York on one count of criminal contempt, in violation of 18 U.S.C. 401(3). The indictment alleged that between 1985 and 1987, petitioner and Goldstein had willfully disobeyed Section II(7) of the 1951 consent decree by engaging in block-booking. Pet. App. 4a.

After a four-day bench trial in November 1988,[3] the district court found petitioner and Goldstein guilty of criminal contempt. Pet. App. 24a-35a. The evidence, which consisted of testimony of movie exhibitors, booking agents, and Goldstein's subordinates, showed that Goldstein had repeatedly conditioned the licensing of some films upon the licensing of other films, in plain violation of Section II(7) of the consent decree. For example, "Fox employees * * * were instructed not to accept any *Mannequin* play-dates unless the exhibitor agreed to play *Black Widow* first." *Id.* at 5a. Goldstein's staff dutifully carried out these instruc-

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[2] That section specifically prohibits petitioner and its employees "[f]rom performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features." *United States* v. *Loew's, Inc.*, [1950-1951] Trade Cas. (CCH) ¶ 62,861, at 64,546 (S.D.N.Y. 1951).

[3] Before trial, the government and Goldstein stipulated that if convicted, she should not be exposed to a penalty of more than six months' imprisonment or a $5,000 fine; the parties thus agreed that Goldstein's "petty" offense did not warrant a trial by jury. The district court accepted that arrangement. The court rejected petitioner's demand for trial by jury even though there was no agreement as to the maximum penalty to which petitioner should be exposed in the event of conviction. See Pet. App. 4a, 26a n.3; note 1, *supra*.

tions: the staff told one independent booking agent that "he would have to play *Black Widow* before he could play *Mannequin*," *id.* at 5a-6a; the staff told another booking agent that "he would have to play *Black Widow* in order to keep his *Mannequin* dates," *id.* at 6a.[4] And Gloria Fennessey, one of Goldstein's subordinates, once told an exhibitor who complained about the block-booking practices: "I know it is illegal, but I have to do my job." C.A. App. 373-374.

Having found that Goldstein, acting within the scope of her corporate authority, willfully violated the consent decree, the court determined that that finding established petitioner's criminal liability as well. Pet. App. 34a.[5] For that reason, the court concluded that evidence concerning petitioner's corporate program for compliance with the decree was not relevant to the firm's liability for criminal contempt. *Ibid.*; see *id.* at 37a n.1.

In December 1988, the district court sentenced petitioner, a repeat offender,[6] to a fine of $500,000, and it assessed costs of $40,397. Pet. App. 6a.

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[4] Goldstein also block-booked *Johnny Dangerously* with *Flamingo Kid* and *Cocoon* with *Prizzi's Honor*. See Pet. App. 29a-30a.

[5] In a pretrial ruling, the court concluded that "in the context of a corporate defendant, a corporation can be held criminally liable for the conduct of its managerial employees acting within the scope of their authority, * * * even if such activities were against corporate policy or specific instructions." Pet. App. 37a. The court thus held that

> proof beyond a reasonable doubt that a managerial employee of [petitioner] willfully violated the consent decree while acting within the scope of his or her authority establishes all the necessary elements of criminal contempt against [petitioner].

Ibid. (footnote omitted).

[6] In 1978, petitioner had entered a plea of nolo contendere to an indictment charging a similar violation for block-booking; the court sentenced petitioner to pay a fine of $25,000 and the costs of the prosecution. See Pet. App. 35a.

2. The court of appeals affirmed the district court's finding of petitioner's criminal contempt but vacated the sentence and remanded for further proceedings. Pet. App. 1a-21a; see note 1, *supra*.[7] The court concluded that the consent decree "prohibits, with unmistakable clarity, the practice of [block-booking]," Pet. App. 7a, and that the "record amply demonstrates that Goldstein, a managerial employee of [petitioner], willfully violated the consent decree while acting within the scope of her authority," *id.* at 8a.

The court then rejected petitioner's argument that it could escape liability by implementing a corporate compliance program. In the court's view, that program, "however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law and the consent decree." Pet. App. 8a. In light of "settled law that a corporation may be held criminally responsible for antitrust violations committed by its employees or agents acting within the scope of their authority," the court refused "to establish higher standards of proof for corporate violations of antitrust consent decrees than for violations of the antitrust laws themselves." *Id.* at 8a, 9a.

ARGUMENT

1. Petitioner renews its contention (Pet. 6-12) that the district court's contempt finding, based on principles of vicarious criminal liability, may not stand where that court did not consider petitioner's good-faith efforts to comply with the consent decree. In light of the "inescapable fact

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[7] The court of appeals affirmed Goldstein's conviction, rejecting her claims that the government presented insufficient evidence, Pet. App. 7a-8a, that venue was lacking in the Southern District of New York, *id.* at 20a, and that the case should have been tried to a jury, *ibid.*

that an artificial entity can only act * * * through its individual officers or agents," *Bellis* v. *United States*, 417 U.S. 85, 90 (1974), this Court has long recognized that there is "no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable * * * because of the knowledge and intent of its agents to whom it has intrusted authority to act," *New York Central & H.R.R.R.* v. *United States*, 212 U.S. 481, 495 (1909); see also *Wilson* v. *United States*, 221 U.S. 361, 377 (1911). Under these settled principles, federal courts have repeatedly held corporations criminally responsible for employees' willful violations of the antitrust laws where those employees were acting within the scope of their corporate authority.[8] Here, the record shows—and petitioner does not now dispute—that one of petitioner's branch managers, Leila J. Goldstein, "flagrantly and repeatedly violated the [consent] decree" by engaging in block-booking. Pet. App. 33a. Under established doctrine, therefore, Goldstein's willful actions rendered petitioner criminally liable.

Petitioner seeks to avoid that straightforward application of the criminal law by pointing to its corporate compliance program—a program designed to ensure employee obedience to the consent decree. But the Court long ago rejected a comparable claim of corporate immunity in the *New York Central & H.R.R.R.* case, where the Circuit Court had held the railroad criminally liable for the Elkins Act violations of its employees despite the fact that "there is no

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[8] *E.g.*, *United States* v. *Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir.) (per curiam), cert. denied, 464 U.S. 956 (1983); *United States* v. *Koppers Co.*, 652 F.2d 290, 298 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); ; *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1004-1007 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

authority shown by the board of directors * * * for the criminal acts of the agents of the company." 212 U.S. at 492. Firms, such as petitioner, establish compliance programs precisely because corporations, under settled principles of criminal law, are not immune from liability for such employee misdeeds. If the program succeeds and prevents employee violations, then the corporation benefits. If, however, the program does not succeed, the corporation must suffer the consequences.[9] As the court of appeals recognized, if the law were now to accept petitioner's argument, "corporations could more easily distance themselves from the wayward acts of their agents—a prospect that threatens the very authority of the court that criminal contempt is designed to preserve." Pet. App. 10a.

2. Petitioner does not seriously dispute that under current law a corporation may be held criminally liable for violating the antitrust laws as a result of the wrongful acts of its employees. Nevertheless, petitioner suggests (Pet. 7-12) that a different rule should obtain when the legal command and obligation flow from a court order, such as the 1951 consent decree, as opposed to a statute, such as the Sherman Act. The court of appeals correctly rejected that proffered exception to the law of vicarious criminal liability, noting that there is "no reason to establish higher standards of proof for corporate violations of antitrust consent decrees than for violations of the antitrust laws themselves." Pet. App. 9a. Petitioner cites no supporting authority for its novel proposition that a corporate compliance program may excuse its criminal liability for violating a court order, nor does the decision of the court below on this point conflict with the decision of any other court of appeals.

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[9] See, *e.g.*, *United States* v. *Basic Constr. Co.*, 711 F.2d at 572-573; *United States* v. *Hilton Hotels Corp.*, 467 F.2d at 1007; *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-205 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971).

In *United States* v. *Greyhound Corp.*, 363 F. Supp. 525 (N.D. Ill. 1973), aff'd, 508 F.2d 529 (7th Cir. 1974), the courts considered the corporate contemnors' efforts to comply with a decree only because the contempt petition expressly charged that the corporation's failure adequately to instruct its ticket agents as to decree compliance was in itself a violation of the decree. See 363 F. Supp. at 543. As the court of appeals recognized, the corporations' "failures to tell [their] agents about the court's decision and order" were part of the government's case-in-chief. *Id.* at 556. In that situation, the courts necessarily examined the reasonableness of the corporation's compliance efforts, since the contempt citation charged the firm in effect with failing to undertake steps to ensure compliance with a complicated decree requirement. Moreover, the corporation's failure to make good faith compliance efforts reflected willfulness on the part of high-ranking corporate agents, quite apart from any willful misconduct by lower-ranking employees. See 508 F.2d at 538.[10] By contrast, the indictment in this case did not challenge the adequacy of petitioner's compliance program, and the evidence overwhelmingly established that petitioner's employees willfully violated the plain terms of the decree. The compliance program therefore did not bear on the contempt charged or any element of the offense.[11]

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[10] In *Greyhound*, the court order at issue required the corporations' agents to quote "voluntarily and accurately" the rates and services offered to the public by its competitors. 508 F.2d at 531 n.4. Both corporations' practices of offering differing services, schedules, routes, and rates to various destinations rendered extremely difficult the reviewing court's task of determining whether the firms' failure to comply with the decree was willful. Neither the district court nor the court of appeals made a finding that any ticket agent knowingly violated the decree.

[11] The strong evidence of willfulness on the part of petitioner's agents also serves to distinguish *Southern Ry.* v. *Brotherhood of Locomotive Firemen*, 337 F.2d 127 (D.C. Cir. 1964), on which petitioner relies (Pet. 11). In that case, there was no evidence that the railroad's employees willfully operated any train without the requisite firemen. See *id.* at 135.

Similarly, in *United States ex rel. Porter* v. *Kroger Grocery & Baking Co.*, 163 F.2d 168 (7th Cir. 1947), a case involving violations of price regulations promulgated by the Office of Price Administration, the court reversed the criminal contempt conviction where the government had erroneously proceeded on the theory "that the intent with which the overcharges were made was immaterial," *id.* at 172, and the record contained no evidence that the firm's employees had deliberately or intentionally made any of the 191 alleged overcharges, *id.* at 177. Again, the instant case is consistent with *Kroger Grocery* since the record here contains ample evidence of the missing ingredient there—willful employee conduct in violation of the decree.[12] Thus, as the court of appeals correctly observed, no case "stand[s] for the proposition that a corporate agent's willful violation of a court order will not be imputed to the corporation because of the corporation's reasonable diligence in attempting to comply with the order." Pet. App. 10a n.2.[13]

3. Finally, petitioner contends (Pet. 12-18) that the court of appeals "adopted a rule of liability at odds with the

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[12] Petitioner suggests (Pet. 9-10 n.11) that the *Kroger Grocery & Baking Co.* case may not be distinguished on that ground, because that case did involve willful employee misconduct. That suggestion is misleading; the court of appeals' reference to employee misconduct concerned employees who were not involved with the overcharges at issue in the case. See 163 F.2d at 176. In *United States* v. *Greyhound Corp.*, *supra*, the district court distinguished *Kroger Grocery* on precisely that ground, observing that in that case "[t]here was no evidence even suggesting that the acts were intentional." 363 F. Supp. at 555.

[13] Cases such as *Vertex Distrib., Inc.* v. *Falcon Foam Plastics, Inc.*, 689 F.2d 885 (9th Cir. 1982), and *Washington Metropolitan Area Transit Auth.* v. *Amalgamated Trade Union*, 531 F.2d 617 (D.C. Cir. 1976) (see Pet. 10-11), are inapposite. Those decisions involved applications of the legal principle that diligence of compliance is relevant in civil contempt proceedings. See *Vertex Distrib.*, 689 F.2d at 891-892; *Washington Metropolitan Area Transit*, 531 F.2d at 621. But as the

numerous decisions of this Court establishing that 'only [t]he least possible power adequate to the end proposed should be used in contempt cases.' " Pet. 13 (quoting *United States* v. *Wilson*, 421 U.S. 309, 319 (1975) (brackets in original)). That contention is meritless. The requirement that, in enforcing compliance with a lawful order, a court exercise " 'the least possible power adequate to the end proposed' " (*Shillitani* v. *United States*, 384 U.S. 364, 371 (1966) (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)), applies to the choice between civil and criminal contempt and the choice of particular sanctions. See *Shillitani*, 384 U.S. at 371 & n.9. None of the decisions cited by petitioner, see, *e.g.*, *United States* v. *Wilson*, 421 U.S. 309

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court of appeals explained, the differences between civil and criminal contempt render those cases inapposite:

> The purpose of civil contempt is remedial and coercive; it thus makes sense to say, at least in some contexts, that if a defendant is doing all it can to comply with a court order, there may be little, if any, coercive purpose that civil contempt sanctions could achieve. Criminal contempt, however, serves the much different purpose of vindicating the court's authority. * * * It serves to punish individuals or corporations for past violations of a court order. Because of this different purpose, the focus of criminal contempt is on the willfulness of the violation. Once it is determined that the corporate agent willfully violated a clear contempt order, the corporation must bear responsibility.

Pet. App. 9a-10a (footnote and citation omitted).

Even in civil contempt cases, reasonable diligence alone will not excuse a corporation's failure to comply with a decree. Rather, the issue is generally whether compliance was possible. See *United States* v. *Rylander*, 460 U.S. 752, 757 (1983); *Badgley* v. *Santacroce*, 800 F.2d 33, 36-37 (2d Cir. 1986), cert. denied, 479 U.S. 1067 (1987). Petitioner has not contended that compliance with the consent decree was impossible. To the contrary, compliance with the decree was a relatively simple matter. The record confirms that petitioner promptly put an end to Goldstein's wrongful conduct once it learned that exhibitors had complained to the government. See C.A. App. 418-419, 453-454, 498-499.

(1975); *Shillitani* v. *United States*, *supra*; *Harris* v. *United States*, 382 U.S. 162 (1965); *In re Michael*, 326 U.S. 224 (1945); and *Nye* v. *United States*, 313 U.S. 33 (1941), suggests, let alone holds, that a corporation may escape criminal contempt liability by implementing a compliance program. Rather, each of those decisions addresses procedural or substantive limitations on the exercise of the contempt power that have no bearing on the novel defense proffered by petitioner.[14] Petitioner was provided all the protections ensured by this Court's contempt decisions; its complaint is with the well-settled substantive rules of corporate criminal liability, which this Court has long embraced and has shown no inclination to change.

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[14] In *Shillitani* v. *United States*, 384 U.S. 364 (1966), for example, the Court held that conditional confinement under a civil contempt order for failure to testify before a grand jury may not extend beyond the term of the grand jury. Once the grand jury's term expired, the Court reasoned, the contemnor lost the ability to comply with the court's order to testify. *Id.* at 371-372. In *United States* v. *Wilson*, 421 U.S. 309 (1975), and *Harris* v. *United States*, 382 U.S. 162 (1965), the Court addressed issues regarding the availability of summary process in contempt prosecutions under Rule 42 of the Federal Rules of Criminal Procedure. And in *In re Michael*, 326 U.S. 224 (1945), and *Nye* v. *United States*, 313 U.S. 33 (1941), the Court dealt with the propriety of using the criminal contempt process as opposed to the substantive criminal law to prosecute violations of court orders.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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